No. 79-6777

In the Supreme Court of the United States

OCTOBER TERM, 1980

GARY KEITH STEAGALD,

Petitioner

—*v.*—

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 13, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. CR78-20 A

UNITED STATES OF AMERICA

v.

HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD

CRIMINAL INDICTMENT—Filed Jan. 24, 1978

THE GRAND JURY CHARGES:

COUNT ONE

That, on or about the 18th day of January, 1978, within the Northern District of Georgia, the defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH and GARY KEITH STEAGALD, did unlawfully and knowingly possess with the intent to distribute a Schedule II controlled substance, that is, a quantity of cocaine hydrochloride, in violation of Title 21 United States Code, Section 841(a)(1).

COUNT TWO

That, beginning at a date unknown to the Grand Jury and continuing up to and including January 18, 1978, in the Northern District of Georgia, the defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD did knowingly and unlawfully combine, conspire, confederate and agree, and have a tactic understanding with one another and with other persons whose names are to the Grand Jury unknown, that they

would commit various criminal offenses against the laws of the United States of America, in violation of Title 21, United States Code, Section 846, that is:

To knowingly, intentionally and unlawfully possess with the intent to distribute, and to distribute, large quantities of cocaine hydrochloride, a Schedule II controlled narcotic substance, in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of said conspiracy, and to effect the objects and purposes thereof, the defendants committed various overt acts within the Northern District of Georgia and elsewhere, including, but not limited to, the following:

1. On or about January 13, 1978, defendant HOYT ALBERT GAULTNEY caused a shipment of brass tables and lamps, some of which contained cocaine hydrochloride, to be picked up at Hartsfield International Airport, Atlanta, Georgia.

2. On or about January 18, 1978, in Gwinnett County, Georgia, defendants, HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD knowingly and intentionally possessed with the intent to distribute approximately 45 pounds of cocaine hydrochloride, a Schedule II controlled substance.

COUNT THREE

That, on or about the 11th day of January, 1978, within the Northern District of Georgia, the defendant HOYT ALBERT GAULTNEY did knowingly, wilfully, and unlawfully import and cause to be imported into the customs territory of the United States from a place outside thereof, to wit, Gogota, Colombia, South America, a

quantity of cocaine hydrochloride, a Schedule II controlled narcotic substance, in violation of Title 21, United States Code, Section 952(a).

A TRUE BILL

/s/ [Illegible]
Foreman

WILLIAM L. HARPER
United States Attorney

/s/ Robert A. Boas
ROBERT A. BOAS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action No. CR 78-20 A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOYT ALBERT GAULTNEY, KATHY RENEE GAULTNEY, JAMES ALBERT SMITH, and GARY KEITH STEAGALD, DEFENDANTS

MAGISTRATE'S REPORT AND RECOMMENDATION UPON DEFENDANTS' MOTIONS TO SUPPRESS AND TO DISMISS—Filed April 7, 1978

Defendants Hoyt Albert Gaultney, Kathy Renee Gaultney, James Albert Smith, and Gary Keith Steagald have been charged in a three-count indictment in this case with violations of the federal drug laws. Counts One and Two charge all four defendants with conspiracy to possess with intent to distribute and the possession with intent to distribute of cocaine in violation of 21 U.S.C. §§ 841 (a)(1) and 846. Count Three charges defendant Hoyt Albert Gaultney with the importation of cocaine in violation of 21 U.S.C. § 952(a). They have filed motions to suppress evidence and to dismiss the indictment. Pursuant to 28 U.S.C. § 636(b) and this Court's Local Rule 290, these motions have been heard by the undersigned Magistrate, who now submits the following report and recommendation as to disposition.

MOTION TO SUPPRESS

On the afternoon of January 18, 1978, federal Drug Enforcement Administration (D.E.A.) Agents Kelly Goodowens, Wayne Smith and James Williams, assisted

by other D.E.A. agents and state officers, went to premises located at 6291 Cary Court, Buford, Gwinnett County, Georgia, in an effort to locate and arrest one Richard Harrison Lyons, a/k/a "Ricky" Lyons, for whom an arrest warrant had been issued by the United States District Court for the Southern District of Georgia on July 14, 1977, on the basis of an indictment charging Lyons with violations of the federal drug laws. (Tr. Vol. I, pp. 16-19, 20-25, Govt. Ex. 1). Two days earlier, on January 16, 1978, Agent Goodowens had been advised by D.E.A. Agent Joseph Rassey that on January 14, 1978, he had received information from a reliable confidential informant of his that Lyons and another individual named "Jimmy" using the alias "Carl James", who he believed to be wanted on state drug charges in Georgia, could be located within the next twenty-four hours or so at telephone number 404-945-3773 in the Atlanta, Georgia, area. Agent Goodowens determined from the telephone company that the number (404-945-3773) was listed to a Richard Fisher, 6291 Cary Drive, Buford, Gwinnett County, Georgia. After trying unsuccessfully to locate this address, Agent Goodowens again contacted the telephone company and found out that the correct address was 6291 Cary *Court* and obtained detailed directions on how to find it. (Tr. Vol. I, pp. 16-20, Vol. II, pp. 36-38). On January 18, 1978, Agent Goodowens was advised by Agent Rassey that he had had several other conversations with his confidential informant between January 16-18, 1978, and was told each time, the last being on the morning of January 18, that Lyons and "Jimmy" were still at that telephone number and that there would be four or five people at that location. (Tr. Vol. II, pp. 38-39, 42, 49).

Upon arriving at the premises at 6291 Cary Court, Agents Goodowens and Smith noticed two men in the vicinity of a Volkswagen parked in the driveway. These two men were subsequently identified as defendants Hoyt Albert Gaultney and Gary Keith Steagald. Agent Smith

at first thought defendant Gaultney was Ricky Lyons, but upon learning that he was not continued on to the house and knocked on the front door. Defendant Kathy Gaultney answered the door and, after being advised by Agent Smith that he was a police officer with an arrest warrant and asked whether he could come in, admitted him. After being admitted, Agent Smith told her the arrest warrant was for Ricky Lyons and asked whether he was in the house. Mrs. Gaultney stated that she did not know who Ricky Lyons was and that there was no one by that name in the house. Agent Smith directed Mrs. Gaultney to place her hands on the wall and asked another officer, Detective Conway, to watch her while he checked the house for Lyons. (Tr. Vol. I, pp. 24-26; Vol. II, pp. 55-57, 77). Upon entering a front bedroom, Agent Smith observed a set of triple beam balance scales and a clear plastic bag containing white powder on a small sewing-type table. (Tr. Vol. II, pp. 59-60; Govt. Ex. 3). Based on his experience as a narcotics officer, Agent Smith immediately suspected this white powder to be some kind of controlled substance, probably cocaine, and after checking the rest of the house and not finding Lyons, he went back outside the house and advised Agent Goodowens of what he had seen. (Tr. Vol. II, pp. 60-62). Agent Goodowens immediately entered the house and went to the bedroom where he observed the scales and suspected cocaine on the small table as well as a suitcase lying open on the bed containing more clear plastic bags full of what appeared to be cocaine. (Tr. Vol. I, pp. 31-33; Govt. Ex. 3A).[1] Defendants Hoyt Gaultney and Gary Steagald were then brought into the living room area of the house where Mrs. Gaultney was being detained and Agent Smith left to drive to Atlanta to obtain a search warrant for the house. (Tr. Vol. II, pp. 63-64).

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[1] Agent Smith did not see the cocaine in the open suitcase on the bed.

After defendant Hoyt Gaultney had been in the house for a short while, he called D.E.A. Agent James Williams over and asked to talk with him. Agent Williams took defendant Gaultney back to the left back bedroom in order to talk to him in private, advised him of his Miranda rights, and made arrangements to tape record his statement. While this was going on, Agent Goodowens conducted a search of the bedroom for weapons during which he removed a small gray suitcase from a shelf inside a closet. Upon opening the suitcase, Agent Goodowens observed what appeared to be drug paraphenallia, so he removed the suitcase from the room. (Tr. Vol. I, pp. 36-37; Vol. III, pp. 4-7, 33-34). Defendant Gaultney told Agent Williams that there were fifty pounds of cocaine in the house and led him to the right front bedroom where he pointed out a brown suitcase in a back corner of the room which he said contained the cocaine. (Tr. Vol. III, p. 8).

While the agents were awaiting word from Agent Smith that a search warrant for the house had been obtained, the telephone rang on several occasions. In one of these calls, which occurred at about 7:25 p.m., a male identifying himself as "Jimbo[y]", asked for "Al" or "Cat Woman". Upon being told by Agent Goodowens, who did not identify himself, that they were outside at the time, this person stated that he would be arriving at the house in about five minutes. Hearing Agent Goodowens tell his fellow officers that "Jimbo[y]" would be arriving shortly, defendant Gaultney volunteered that "Jimbo[y]" would probably be carrying a gun and would not hesitate to use it under the right circumstances and requested that the agents allow him to move away from his present location, which was apparently in line of fire from the front door. Based upon Gaultney's statement that "Jimbo[y]" was staying there and the fact that they had found a traffic ticket lying on a table in the house in the name of "Carl Ray James", the D.E.A. agents thought that "Jimbo[y]" might be the same per-

son identified by Agent Rassey's informant as the state fugitive known as "Jimmy". (Tr. Vol. I, pp. 100-101; Vol. II, p. 7).

During this time, Agent Smith had appeared before United States Magistrate J. Owen Forrester and obtained a search warrant for the Cary Court residence. Agent Smith testified that Magistrate Forrester signed the search warrant around 7:30 p.m. and immediately thereafter, he, Agent Smith, telephoned his fellow agents at the Cary Court premises to advise them that the search warrant had been signed.[2] Agent Smith then left the courthouse with the search warrant, stopped for something to eat, and arrived back at the Cary Court premises around 9:00 p.m. (Tr. Vol. II, pp. 66-67).

Around 7:30 p.m., while Agent Smith was on the phone and advising the agents at the premises that the search warrant had been issued, defendant James Albert Smith and his wife arrived at the premises in a pickup truck. Upon entering the house, defendant Smith was "frisked" and found to be in possession of a handgun. He produced a driver's license in the name of "Carl Ray James" but refused to identify himself any further than by giving the name "Jimmy". Defendant Smith and his wife were then taken to the living room with the other defendants and Agent Goodowens checked the pickup truck to determine if there were any other persons in it. (Tr. Vol. I, pp. 104-108; Vol. II, pp. 7, 21-23).

About 7:45 p.m., after having been advised by Agent Smith that a search warrant for the premises had been

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[2] Although the warrant contains a notation on it in the Magistrate's handwriting of 8:00 p.m., Judge Forrester himself recalled at the hearing that he "would have felt certain that it was earlier than eight o'clock." (Tr. Vol. II, p. 31). In any event, since Judge Forrester also recalled that Agent Smith made a telephone call right after the warrant was signed (Tr. Vol. II, p. 32), and since Agent Goodowens testified that the house was not searched until after Agent Smith had called advising that the warrant had been signed (Tr. Vol. I, p. 35) this discrepancy does not effect the validity of the search.

obtained, the agents executed the search warrant and seized, inter alia, the brown suitcase pointed out by Gaultney and containing approximately forty-four pounds of cocaine. (Tr. Vol. I, p. 93; Govt. Ex. 4).

When Agent Smith returned to the house with the search warrant around 9:00 p.m., he learned from the other agents about the arrival of the pickup truck and its occupants and about defendant Smith's refusal to identify himself. He also spoke to Mr. Richard Fisher, the owner of the residence who had arrived, who told him that defendants Smith had rented the premises from him using the name "Jim Travis". Since it was believed that "Jimmy" was wanted by state authorities, Agent Smith attempted to get further information on defendant Smith from the G.B.I., but was unsuccessful. In an attempt to determine who defendant Smith really was, Agent Smith went outside to the pickup truck and looked through it, hoping to find some indication of his true identity. He did not find anything in the glove compartment, but in the cab of the truck, behind the front seat, he found a brown briefcase, which he brought inside the house. Although there was nothing inside the briefcase showing who "Jimmy" really was, it did contain several kinds of illegal drugs and polaroid photographs of what appeared to be bales of marihuana and the bags of cocaine found inside the house. Agent Smith then seized the briefcase and its contents as suspected contraband and potential evidence in the case. The truck was also seized on the basis of the contraband found in the briefcase. Defendant Smith was not finally identified until later that evening at the D.E.A. office. (Tr. Vol. II, pp. 23, 68-70, 96-97).

Defendants Hoyt Gaultney, Kathy Gaultney, James Albert Smith and Gary Keith Steagald were subsequently transported to Atlanta and charged on the basis of the cocaine seized in the searches. Subsequently, on January 19, 1978, a second search warrant (Govt. Ex. 6) was obtained for the Cary Court residence and executed.

(Tr. Vol. I, pp. 39-41). On January 20, 1978, a search warrant was obtained for a warehouse located on Mills Street in Lawrenceville, Georgia (Govt. Ex. 7), and executed. (Tr. Vol. III, pp. 14-15). Finally, on January 24, 1978, a search warrant was obtained for a warehouse in College Park, Georgia (Govt. Ex. 8), and thereafter executed (Tr. Vol. II, pp. 70).

In claiming that the above searches and seizures by the D.E.A. agents were illegal, defendants first contend that the initial entry by the agents into the Cary Court premises on January 18, 1978, was illegal. Defendants argue that the entry was not pursuant to a valid search warrant nor was it justified by exigent circumstances requiring a warrantless entry. The government argues that the D.E.A. agents' initial entry into the Cary Court premises was legal because it was made for the purpose of executing a valid outstanding arrest warrant for Richard Harrison "Ricky" Lyons, who the Agents reasonably believed to be inside the premises.

As noted by the government in its brief, recent case law in this Circuit has made it clear that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to intrude into a home and that there need not be a showing of exigent circumstances in order to validate such an entry. All that is required before an officer may execute an arrest warrant at the home of a third person is a "reasonable belief" by the officer that the person sought is within the premises to be entered. *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977); *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976); *Rodriguez* v. *Jones*, 473 F.2d 599, 605-06 (5th Cir. 1973), *cert. denied*, 412 U.S. 953. It is undisputed that at the time of entry, January 18, 1978, there was a valid outstanding federal arrest warrant for Ricky Lyons from the United States District Court for the Southern District of Georgia based upon an indictment for alleged drug violations. Moreover, it is clear that both Agent Goodowens and Agent Smith

were fully aware of the existence of this warrant. The fact that they did not have the warrant, or a copy thereof, in hand when they went to the Cary Court premises to arrest Lyons is of no significance. Rule 4(d)(3), Federal Rules of Criminal Procedure; *Barber* v. *United States*, 412 F.2d 775 (5th Cir. 1969); *United States* v. *Leftwich*, 461 F.2d 586 (3d Cir. 1972), *cert. denied*, 409 U.S. 915. Accordingly, the question here is whether, at the time of entry, the facts and circumstances within the agents' knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man to "reasonably believe" that Ricky Lyons was inside the Cary Court premises.

From the evidence presented, the Magistrate is satisfied that the officers had sufficient facts and circumstances to "reasonably believe" that Ricky Lyons was in the Cary Court premises and that their entry into the premises was lawful and justified. They had received information from D.E.A. Agent Rassey that a confidential reliable informant of his had advised that Lyons and a state fugitive known as "Jimmy" would be staying at an address in the Atlanta, Georgia, area with telephone number 404-945-3773. Agent Goodowens had traced that phone number to 6291 Cary Court, Buford, Gwinnett County, Georgia. Agent Rassey testified that he had known the informant for four to five years and that he had received reliable information from him several times during that period, particularly during the last eighteen months. He also testified that information provided by this same informant had led to at least seven arrests for drug-related offenses, with three of those cases resulting in convictions and the other four still pending. (Tr. Vol. II, pp. 35-36, 51-52). Agent Rassey stated that the informant advised me he had known both Lyons and the state fugitive named "Jimmy" for several years. He stated that on January 14, 1978, the informant advised that he had talked with "Jimmy" by telephone and had been given the telephone number in the Atlanta

area where he and Ricky Lyons could be reached within the next twenty-four hours or so. Agent Rassey further testified that on January 16, 1978, the informant stated he had had a recent conversation with "Jimmy", who was then at the telephone number and that he knew Ricky Lyons was at the same location because he could hear his, Lyons', voice in the background. Agent Rassey further stated that the informant told him on the morning of January 18, 1978, that "Jimmy" and Lyons were still at that telephone number and that several other people would be with them at the location. This information was given by Agent Rassey to Agent Goodowens on January 18, 1978. (Tr. Vol. II, pp. 36-38, 39, 42, 49). Thus, the informant information clearly met the "two-prong test" of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969). Not only had this information come from a source of proven reliability, but the agents were entitled to regard it as credible because they knew it was based on recent, first-hand communication between the informant and the fugitives. The fact that neither Lyons nor "Jimmy" were actually in the premises at the time of the entry does not render it invalid. *United States* v. *Hofman*, 488 F.2d 287 (5th Cir. 1974); *United States* v. *James*, 528 F.2d 999, 1017 (5th Cir. 1976). *See also*, *United States* v. *Harper*, 550 F.2d 610 (10th Cir. 1977), a case similar to the instant case.

Having concluded that the agents' entry into the Cary Court premises was lawful, the Magistrate must also conclude that their observing and subsequent seizure of the cocaine on the front bedroom sewing table (Govt. Ex. 3) and that lying in the open suitcase on the bed in that room (Govt. Ex. 3A) was justified and lawful under the "plain view doctrine". Any evidence in open and plain view that officers come across in the course of a lawful investigation which they observe to be incriminating may be lawfully seized. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Harris* v. *United States*, 390 U.S. 234

(1968); *United States* v. *Hilstrom*, 533 F.2d 209 (5th Cir. 1976); *United States* v. *Woods*, *supra*. Likewise, the closed suitcase full of cocaine in the front bedroom and other evidence found during the search pursuant to the search warrant issued by Judge Forrester were lawfully seized. As pointed out by the government, the only attack made by defendants here is that the warrant was based on information received as a result of an illegal entry into the premises.

The removal, opening and search and seizure of the gray suitcase from the back bedroom closet by Agent Goodowens presents a different situation. Although the contents of the suitcase were not actually seized until after the search warrant for the house had been obtained, the government admits that this bag was in fact illegally searched before the warrant was issued and has stated that it does not intend to introduce the suitcase, the *Mannitol* or any other items contained in the suitcase at the trial of this case. This evidence should be suppressed

The Magistrate is of the further opinion that the search of defendant Smith's truck and the seizure of his briefcase without a warrant was violative of the Fourth Amendment's protection against unreasonable searches and seizures. The government concedes this search does not fall within one of the recognized exceptions to the warrant requirement of the Fourth Amendment. The government attempts to justify the search of defendant Smith's truck and seizure of items therefrom on the ground that it was reasonable and necessary in view of the fact that defendant Smith had persisted in refusing to give the agents his true name. The case of *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972), *reh. denied*, 471 F.2d 750, cited by the government does not support its contention that the search of the pickup truck in this case was reasonable. That case concerned the seizure of a weapon during a "precautionary" search of a vehicle before the driver was allowed to return to his vehicle. As pointed out by defendant, there was no real

justification for an immediate need for defendant Smith's true identity as he was under arrest and was subsequently transported to Atlanta where his true identity was established. Accordingly, the Magistrate must conclude that the search of the pickup truck and seizure and subsequent search of the briefcase were illegal and all items and evidence obtained therefrom should be suppressed.

Finally, as in the case of the January 18, 1978, search warrant for the Cary Court premises (Govt. Ex. 4), the only attack made by defendants upon the other search warrants issued in this case (Govt. Ex. 6, 7 and 8) is that said warrants were based on information obtained as a result of the illegal initial entry into the Cary Court premises and are invalid under the "fruit of the poison tree" doctrine. Therefore, the Magistrate having concluded that the initial entry into the Cary Court premises was not illegal must also conclude that these warrants were based on information received as a result of a lawful entry into the premises and are lawful and valid search warrants.

MOTION TO DISMISS

The defendants have moved to dismiss the indictment due to improper selection of grand and petit jurors, alleging that the plan for jury selection in this District and this Division and the implementation thereof by the Clerk substantially fails to comply with the provisions of the Jury Selection and Service Act and the requirements of the Fifth and Sixth Amendments. An identical motion based upon the same grounds was denied by this Court by Order dated February 2, 1978, in the case of *United States* v. *Roosevelt Warren, et al.*, Criminal Action No. CR76-371A. At the hearing before the Magistrate, defendants agreed that since the instant motion was identical to the motion in *United States* v. *Warren, supra*, and that their evidence and arguments would be

the same as in that case, it would be unnecessary for the Court to further hear the motion and agreed that the Court could determine the merits of the motion based on the record in *United States* v. *Warren*. Accordingly, for the reasons stated in the Court's opinion in *United States* v. *Warren*, a copy of which is attached hereto, it is recommended that the defendant's motion to dismiss be overruled and denied.

RECOMMENDATION

For the foregoing reasons, it is recommended that defendant's motion to suppress be overruled and denied except as to the gray suitcase and its contents which Agent Goodowens found in the back bedroom of the Cary Court premises on January 18, 1978, while Agent Williams was talking to the defendant Hoyt Gaultney and, the briefcase and its contents and other items seized from the pickup truck belonging to defendant Smith, which items should be suppressed. Defendants' motion to dismiss the indictment due to improper selection of grand and petit jurors should be denied.

AND IT IS SO RECOMMENDED this 6th day of April, 1978.

/s/ Allen L. Chancey, Jr.
ALLEN L. CHANCEY, JR.
United States Magistrate

[R, Vol. II, p. 3] PROCEEDINGS

THE COURT: Are the parties ready in the case of the United States against Catherine (Cathy) Renee Gaultney, James Albert Smith and Gary Keith Steagald?

MR. BOAS: Government is ready, Your Honor.

MR. YOUNG: As far as Mr. Steagald is concerned, there are two motions I filed on Friday. Subject to ruling on those motions, I am prepared for Mr. Steagald.

MR. JENKINS: Subject to one motion which was still pending the last time the case came up, which is a motion in limine, which is a short matter, I believe we're ready for trial for Mr. Smith.

MR. HORN: Your Honor, we are ready for trial. We do renew all of our motions previously made on behalf of Cathy Gaultney.

THE COURT: You better outline them so I will know what they are.

MR. HORN: The principal one is the motion to suppress and at all times we object to the evidence and testimony of the government, since it was all obtained as a direct result of what we believe to be an unlawful intrusion [R, Vol. II, p. 4] and followup from that unlawful intrusion.

The independent lab analysis, Your Honor, we're already taken that up in the other matter and we stand on our position in that.

Those are the only two of any consequence, Your Honor.

THE COURT: All right. The Defendant Steagald renewal of his motion for judgment of acquittal is overruled and denied.

Defendant Steagald motion to dismiss the indictment is overruled and denied.

Now, the motion to suppress was heard at the last trial, was it not?

MR. HORN: Well, we renewed it. It was heard initially by the magistrate and Your Honor confirmed his rulings on our exceptions.

THE COURT: Is there a need for me to go through that again at this trial? Can I simply make the same ruling on the same evidence?

MR. JENKINS: As far as Mr. Smith is concerned, as long as the Court is aware that we renewed it and the Court is going to rule the same way, I don't see any point in arguing it again.

MR. YOUNG: For the record, Your Honor, * * *

* * * *

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 78-5329, 78-5416

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOYT ALBERT GAULTNEY, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

OPINION—Filed Nov. 13, 1979

Appeals from the United States District Court
for the Northern District of Georgia

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

CHARLES CLARK, Circuit Judge:

Hoyt A. Gaultney and Gary K. Steagald were convicted of possessing cocaine in violation of 21 U.S.C. § 841 (a) (1), and with conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846. Additionally, Gaultney was convicted of the unlawful importation of cocaine in violation of 21 U.S.C. § 952 (a). They appeal, raising a variety of issues. We affirm.

Gaultney and Steagald argue first that the original entry by local police and federal agents into the premises in which cocaine was subsequently found was unlawful,

in that the entry was neither pursuant to a search warrant nor justified by probable cause and exigent circumstances. The evidence shows that on January 4, 1978, Special Agent Joseph Rassey of the Federal Drug Enforcement Administration [DEA] in Detroit, Michigan, was contacted by a confidential informant. The informant advised that he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another individual named "Jimmy," whom he believed to be wanted on state drug charges in Georgia. The informant advised that "Jimmy" currently was using the alias "Carl James." Additionally, the informant stated that he had known both of these individuals personally.[1] Agent Rassey did not know the status of either individual, but because this informant's information had been reliable in the past,[2] Rassey told the informant to call as soon as the individuals were located at a definite spot. On Saturday evening, January 14, 1978, Rassey received a telephone call from the informant advising that he had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours.[3] The informant gave this tele-

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[1] Special Agent Rassey testified that the confidential informant had known "Jimmy" and Ricky Lyons for a number of years and had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977.

[2] Special Agent Rassey testified that he had known the informant for approximately four or five years, that the informant had furnished reliable information to the DEA in the past, and that on the basis of such information seven drug-related arrests had occurred. Rassey further testified that three convictions had been obtained in those cases and that four cases were pending. Counsel for Gaultney admitted at oral argument that the past reliability of the confidential informant was not at issue.

[3] Special Agent Rassey testified that: "On the day the informant called me and said he had received a phone number from Jimmy, and it was a number where Jimmy and Ricky were going to be within the next twenty-four hours."

phone number to Rassey, who, in turn, gave it to Special Agent Kelly Goodowens of the DEA's Savannah, Georgia, District Office on Monday, January 16. Goodowens was aware that one Richard Harrison Lyons, a/k/a "Ricky" Lyons, had been indicted six months earlier in the Southern District of Georgia, in a marijuana smuggling case. Upon further investigation, Goodowens determined that an arrest warrant had been issued for Lyons and that the DEA still listed Lyons as a fugitive. Thereafter, Goodowens contacted the telephone company and learned that the telephone number provided by Agent Rassey's informant was listed to a Richard E. Fisher at a rural address in Buford, Georgia.

On Monday, January 16, 1978, Rassey received another telephone call from his informant, who advised that a recent telephone conversation with "Jimmy" confirmed his presence at the telephone number previously given Rassey by the informant. The informant also stated that Ricky Lyons was at the same location, noting that he had heard Lyon's voice in the background during his telephone conversation with "Jimmy." Rassey had several other telephone conversations with the informant between January 16 and the morning of January 18. Each time the informant confirmed that "Jimmy" and Ricky Lyons were still at the location of the telephone number. The informant also advised Rassey that several other people would be with Lyons at the location. This information was passed along to Goodowens by Rassey in a series of telephone conversations, the last taking place on the morning of Wednesday, January 18, 1978.

On the afternoon of January 18, Goodowens and DEA Agents Wayne Smith and James Williams, after consulting with a telephone company installer and local police, located the address to which the telephone number was listed. On driving past the house, these agents observed a Volkswagen parked in the driveway and smoke coming from the chimney of the house. No people were observed outside in the vicinity of the house or

automobile. Approximately thirty minutes later, after coordinating plans for the execution of the arrest warrant on Ricky Lyons, Agents Goodowens, Smith, and Williams led a force of approximately twelve federal agents and local police officers to the residence. Upon approaching the house, Goodowens and Smith noticed two men located near the rear of the parked Volkswagen, which now had its engine cover up. Smith at first believed one of the men to be Ricky Lyons, but, upon realizing he was not, continued toward the house. One of the two men, later identified as Gaultney, was armed. Both Gaultney and the other man, later identified as Steagald, were detained pending Smith's return from the house.

Agent Smith arrived at the house and knocked on the front door. Gaultney's wife, Cathy, answered the door. Smith advised Mrs. Gaultney that he was a police officer with an arrest warrant. He asked to come into the house and was admitted. Smith told Mrs. Gaultney he had an arrest warrant for Ricky Lyons and asked if Lyons was in the house. Mrs. Gaultney stated that there was "no one by that name" in the house. Smith then told Mrs. Gaultney to place her hands on the wall and asked Detective Conway to watch her. Smith began a sweep search of the premises.

Agent Smith walked down a short hall to his right and looked first in a bathroom situated between two bedrooms. Seeing no one in the bathroom, but observing a light coming from under the door to the front bedroom on his right, he opened the door and entered. Immediately inside Smith observed a small table upon which was a set of triple beam balance scales, a clear plastic bag containing a white powder, and a box containing a roll of clear plastic bags. Smith completed the sweep search of the premises without locating Lyons. He returned outside to advise the other officers of what he had discovered in the house. Agent Goodowens then entered the house and, upon entering the front bedroom, saw the scales, the bag of white powder, and the roll of

plastic bags on a small table, together with what appeared to be more bags of white powder partially visible inside a green garbage bag lying in an open suitcase on the bed. Approximately fifteen minutes later, Agent Smith left for Atlanta to obtain a search warrant for the house. Upon obtaining a warrant, Smith telephoned the agents who had remained at the house and advised them of the existence of the warrant.

About this time, a truck occupied by a man and woman arrived at the house. Based on information obtained from appellant Gaultney, the agents believed the truck to contain "Jimmy," the state fugitive about whom Rassey's informant had spoken. This individual immediately was detained on his entry to the house and initially declined to identify himself any further than his first name of Jimmy. Later, the individual produced a North Carolina driver's license bearing the name "Carl James." That evening, the individual was identified as James Albert Smith, who was wanted by state authorities on drug charges.

A subsequent search of the house conducted pursuant to the warrant obtained by Agent Smith revealed a variety of narcotics possessing paraphernalia and some 43 pounds of almost pure cocaine.[4]

The law of this circuit is settled that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the subject." *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied sub nom. Miller* v. *United States*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977), and *cert. denied*, 430

[4] The search revealed a clear plastic bag containing 450 grams of 45% pure cocaine hydrochloride, two suitcases containing 8,394 grams of 99% pure cocaine hydrochloride and 10,445 grams of 95% pure cocaine hydrochloride respectively, a box of clear plastic bags, two sets of Ohaus triple beam balance scales, and a bag containing beta-manitol, a common cutting agent for cocaine.

U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). *See United States* v. *James*, 528 F.2d 999, 1017 (5th Cir. 1976), *cert. denied sub nom. Henry* v. *United States*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1977); *Rodriguez* v. *Jones*, 473 F.2d 599, 605-06 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973). As stated in *Cravero*, the test properly is framed in terms of the officer's reasonable belief.

> Reasonable belief embodies the same standards of reasonableness [as does probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

545 F.2d at 421.

A review of the facts in this case discloses that a valid warrant for the arrest of Richard Harrison Lyons, a/k/a "Ricky" Lyons was outstanding and that first-hand information from a reliable informant established that Lyons recently had been and was believed still to be in the dwelling containing the telephone. Based on these facts, the agents had objective grounds for forming a reasonable belief that the fugitive was present at the premises in question when they entered. *United States* v. *James*, 528 F.2d at 1017; *Rodriguez* v. *Jones*, 473 F.2d at 606. Having such a reasonable belief, the agent's warrantless entry of the premises was proper. *United States* v. *Cravero*, 545 F.2d at 421. The fact that the fugitive named in the arrest warrant was not found to be present on the premises at the moment of entry does not render the entry invalid. *United States* v. *James*, 528 F.2d at 1017; *United States* v. *Hofman*, 488 F.2d 287, 289 (5th Cir. 1974).

Counsel refers this court to the cases of *Payton* v. *New York* and *Riddick* v. *New York*, recently restored by

the Supreme Court to its calendar for reargument.[5] There, New York State statutes authorizing the entry of a suspect's home in the absence of exigent circumstances to effect the suspect's *warrantless arrest* are challenged as being violative of the fourth amendment. These cases, and the issue thus presented to the Supreme Court, are inapposite to the issue before this court today. Today, we apply the reasonable belief standard announced in *Cravero* where the entry occurs to execute an existing, valid arrest warrant.

Gaultney and Steagald further argue that the refusal of the district court to order the government to provide their expert witness with a primary reference sample[6] for use in an independent laboratory analysis constitutes a denial of due process of law. This court has held that

> Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion.

Barnard v. *Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). *See* F.R.Crim.P. 16(a)(1)(C). In cases involving a controlled substance, courts have held a concomitant part of the examination or inspection to be the right of the accused to have an independent chemical analysis

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[5] The Court of Appeals of New York affirmed the defendants' convictions in these cases. *People* v. *Payton*, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978). On appeal, the United States Supreme Court noted probable jurisdiction. 439 U.S. 1044, 99 S.Ct. 718, 58 L.Ed.2d 703 (1978). The cases were argued on March 26, 1979, 47 U.S.L.W. 3651 (U.S. April 3, 1979) (Nos. 78-5420, 5421), and subsequently were restored to the calendar for reargument. —— U.S. ——, 99 S.Ct. 2049, 60 L.Ed.2d 658 (1979).

[6] A primary reference sample is a sample of the drug in question, here cocaine hydrochloride, whose quality and purity are known.

performed on the seized substance. *See e.g., United States* v. *Pollock*, 402 F.Supp. 1310, 1312 (D. Mass. 1975); *United States* v. *Acarino*, 270 F.Supp. 526, 528 (E.D. N.Y. 1967). *See also, United States* v. *Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). Our inquiry, therefore, focuses on whether the refusal of the district court to order the government to provide the defendant's expert with a primary reference sample placed an unreasonable restriction on the defendant's right to an independent analysis so as to deny him due process of law.

The facts disclose that the parties agreed that the independent analysis of the seized substance would be conducted at the Georgia State Crime Laboratory [GSCL] in Atlanta, Georgia. The GSCL has and enforces a policy of not supplying visiting independent examiners with a primary reference sample of controlled substances. Testimony from a government witness stated that the GSCL adheres to this policy for three reasons. First, independent examiners who are licensed to possess controlled substances are allowed by law to possess their own primary reference samples. *See generally* 21 U.S.C. §§ 821-24; 21 C.F.R. § 1301; Ga. Code Ann. §§ 79A-813 to -816. Second, those independent examiners not so licensed can purchase "exempt standards" [7] from various private manufacturers. Third, various analytical chemistry techniques utilizing instruments available at the GSCL allow an analysis of an unknown compound without the use of a reference sample, either primary or exempt.

Gaultney and Steagald make no showing that the policy of the GSCL prevented their expert from conducting an independent analysis to show that the seized sub-

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[7] An exempt standard is a mixture containing a controlled substance, here cocaine hydrochloride, that is prepared for laboratory, industrial, educational or special research purposes which is packaged in such a manner, combination, quantity, proportion, or conconcentration so as not to present a potential for abuse. *See* 21 C.F.R. §§ 1308.23-.24.

stance was not cocaine. The record indicates that the expert never availed himself of the opportunity to examine the seized substance to determine whether he could make an independent analysis of its contents. Despite never previously having attempted an analysis using an exempt standard, the expert testified that any tests he might run restricted by the GSCL guidelines would yield results inferior to those obtained by the government's tests. This contention was vigorously disputed by the testimony of the GSCL Senior Forensic Chemist. In light of this conflicting testimony, there was no error in the trial court's determination that the GSCL policies regarding primary reference samples are reasonable. They did not operate to deprive appellants of due process of law.

Steagald additionally argues that the evidence produced at trial was insufficient to prove the requisite knowledge and intent to sustain his convictions. The evidence produced at trial shows that on September 16, 1977, Steagald contacted the Able-1 Answering Service in Atlanta, Georgia, to arrange a telephone answering service for the Rosen Import Company, Inc. A written agreement for such services was executed on behalf of Rosen Import Company by "G. K. Steagald (mgr.)." Able-1 subsequently received a check from Rosen Import Company, signed by G. K. Steagald, in payment for services rendered. On January 12, 1978, Steagald executed a lease agreement for warehouse space at 100-D Mill Street in Lawrenceville, Georgia. Steagald leased the warehouse in his own name and paid the first month's rent with a check drawn on the account of Rosen Import Company. On January 12, 1978, Bruce Duncan & Co., customs house brokers in Atlanta, Georgia, received a call from the Delta Airlines Airfreight Office [Delta] at Hartsfield International Airport in Atlanta, advising that Delta was holding a shipment of sixteen cartons of lamps and brass table bases from Colombia, South America, which were consigned to Rosen Import Company.

Having handled previous Rosen Import Company shipments, Bruce Duncan & Co. was familiar with Steagald as a representative of that company and therefore called to advise him that this shipment had arrived. Steagald requested that Bruce Duncan & Co. arrange for delivery of the shipment for the next day because "his customers needed the products." Bruce Duncan & Co., acting on information furnished by Steagald, contacted Theatres Service Company [TSC] regarding the delivery of the shipment. On January 14, 1978, after contact with both Delta and Steagald, TSC delivered sixteen crates to the warehouse at 100-D Mill Street. Steagald paid the freight charges with a Rosen Import Company check, signed for the shipment, and received a copy of the freight waybill as his receipt.

Steagald argues that the evidence produced is consistent with the innocent activities of an importer and that the government's evidence, by failing to place him inside the Buford, Georgia, house, fails sufficiently to prove knowledge and intent. However, the government's evidence also showed that during the search of the Buford, Georgia, house, the copy of the TSC freight waybill received by Steagald upon delivery of the sixteen crates to the Mill Street warehouse was discovered on the dining room table. Additionally, agents found in the house two blank Rosen Import Company checks bearing the next two consecutive numbers to that on the check used by Steagald to pay the TSC freight charges. The evidence further showed that Steagald, when taken into custody, was wearing only slacks and a long-sleeve shirt, clothing inconsistent with the coldness of the January afternoon, and that once taken inside the Buford, Georgia, house, told a DEA agent that he was cold and requested that she get a sweater or coat for him from the kitchen area. Moreover, on January 20, DEA agents obtained a search warrant for the warehouse located at 100-D Mill Street. There, agents discovered numerous wooden crates that had been opened previously and a

large number of lamps and brass table bases. All the brass table bases were hollow inside. During the search agents discovered a bag of white powder, subsequently determined to be 483 grams of cocaine, 70% pure, inside one of the brass table bases.

The sufficiency of the evidence to establish Steagald's knowledge and intent must be viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), with all credibility choices considered in support of the jury verdict. *United States* v. *Barresi*, 601 F.2d 193, at 195 (5th Cir. Aug. 22, 1979); *United States* v. *Black*, 497 F.2d 1039 (5th Cir. 1974). Applying this standard, there was sufficient evidence to support the jury's verdict.

Steagald further contends that the trial court committed reversible error when it failed to dismiss the indictment on grounds of double jeopardy. Steagald's first trial ended when, pursuant to his motion, the trial court declared a mistrial because of the publication of a prejudicial article in a local newspaper. Steagald claims that the prejudicial material in the article arose from a statement attributed to Gaultney and furnished to the press by the United States Attorney. Steagald argues that this action constitutes prosecutorial overreaching of such magnitude as to require application of the bar of double jeopardy. The law in this circuit was stated in *United States* v. *Kessler*, 530 F.2d 1246 (5th Cir. 1976), thus:

> [U]nder ordinary circumstances, a defendant's request for a mistrial removes any constitutional barrier to retrial. . . . But the Supreme Court recognizes that there may be exceptions to that rule—rare cases involving circumstances which are "attributable to prosecutorial * * * overreaching,"
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> Where "prosecutorial overreaching" is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. . . .
>
> * * * *

> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to reasonably conclude that a continuation of the tainted proceeding would result in a conviction.

530 F.2d at 1255-1256. This analysis must consider the totality of the circumstances prior to the mistrial in order to determine whether prosecutorial overreaching existed. *Id.* at 1256.

Under *Kesler's* test, the prosecutor's actions do not come close to prosecutorial overreaching. The record, as clarified by counsel during oral argument, shows that the transcript of Gaultney's statement which the prosecutor provided to the press contained no information that had not been introduced previously in the presence of the jury. Indeed, the United States Attorney's actions appear to have been motivated by a desire to ensure accuracy in the press's accounts. There was no error in the trial court's denial of Steagald's motion to dismiss the indictment on grounds of double jeopardy.

Finally, Steagald contends that the trial court committed reversible error in its supplemental charge to the jury, first by refusing to recharge on specific intent and reasonable doubt and second by inaccurately defining intent by failing to refer to specific intent. A review of the supplemental charge to the jury, together with the court's original charge, discloses no error. The district court in its supplemental charge expressly cautioned the jury not to consider his supplemental charge in an isolated context, but to consider the entire charge as given, ascribing no greater weight to the supplemental charge than to the original charge. In so doing, the district court took an appropriate and previously approved step to ensure a balanced charge so as to avoid any possibility of prejudice to the defendant. *United States* v. *Suther-*

land, 428 F.2d 1152, 1157-58 (5th Cir. 1970), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed. 2d 668 (1972). Furthermore, the original and supplemental charges, when considered as combined charges, accurately cover the points of law at issue. *United States* v. *Blevins*, 555 F.2d 1236, 1239 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978).

The convictions of Hoyt A. Gaultney and Gary K. Steagald are

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

I respectfully dissent from that portion of the opinion relating to the entry and search of the premises.

United States v. *Cravero*, 545 F.2d 406 (5th Cir.), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), permitted, without a search warrant, the entry of premises of a third party for execution of an arrest warrant, based upon the officer's *reasonable belief* that the subject of the arrest warrant was within the building. The court reasoned that despite a lack of exigent circumstances, an officer who has already been to the magistrate once to secure the arrest warrant need not make an additional trip if he has determined that the suspect is within certain premises. 545 F.2d at 421.

In *Cravero* the officers personally had observed the subject enter the dwelling and, after maintaining surveillance for several hours, reasonably concluded that the subject was still within the house. Here, however, we are confronted with a different factual situation. The arresting officer had not observed Ricky Lyons, the subject of the arrest warrant. His belief that Lyons was within the premises was based solely upon an informant's

tip. The informant had not seen Lyons on the premises,[1] but had merely heard his voice in the background during a telephone call from Jimmy, Lyons' companion, who stated that he and Lyons were at the location of a given telephone number. After matching the telephone number with a residence,[2] the officers, without first applying to a detached magistrate for a search warrant, proceeded to the premises where they detained the defendants and, after entering and looking through the rooms, discovered not the subject of the arrest warrant, but a cache of cocaine. As in *Cravero* there was an arrest warrant but no exigent circumstances; unlike *Cravero* the evidence linking the subject to the premises was extremely fragile and insufficient to justify an entry without a search warrant.[3]

In *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court extended the *Terry* doctrine[4] to include a stop based not only on the policeman's observations but also on an informant's tip

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[1] Compare with *Rodriguez* v. *Jones*, 473 F.2d 599 (5th Cir.), *cert. denied*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973) where informant had observed the subject enter the building.

[2] No address or name of resident was furnished by informant, but these were ascertained from the telephone company.

[3] The circuits are not in accord on this issue. The Third Circuit, in *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 928 (3rd Cir. 1974), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976), held: "Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." However, the Tenth Circuit, citing *Cravero* as authority, affirmed denial of a motion to suppress in a case factually similar to the case before us. *United States* v. *Harper*, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837, 98 S.Ct. 128, 54 L.Ed.2d 99 (1977).

[4] *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

which did not satisfy the *Aguilar-Spinelli* criteria.[5] *Adams* and *Terry* involved a minimal invasion of privacy, however, as compared with the greater intrusion occasioned by the search of a third party's private home. When an intrusion of such magnitude occurs, if not based upon the policeman's personal observation, nothing short of a full-fledged *Aguilar-Spinelli* tip should be acceptable.

Therefore, I would reverse the denial of the motion to suppress.

I concur with the remainder of the opinion relating to the other grounds of appeal.

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[5] *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 78-5329, 78-5416

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOYT ALBERT GAULTNEY, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

OPINION—April 14, 1980

Appeals from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

[Opinion Nov. 13, 1979, 606 F.2d 540 (5th Cir. 1979)]

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

PER CURIAM:

The decision of this panel in these actions appears at 606 F.2d 540 (5th Cir. 1979). On petition for panel rehearing, the majority opinion is modified by inserting the following paragraph after the thirteenth line, in the first column, on page 545:

Where the information leading to the formulation of the officer's reasonable belief is supplied by a confidential informant, a defendant at a motion to suppress hearing may challenge the validity of the information under *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli* v. *United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). *See generally Rodriguez* v. *Jones*, 473 F.2d [599] at 605-06 n.3. The inquiry to be made is simple and straightforward: Were the officers who decided to act on the information supplied by the confidential informant aware at the time they chose to act of "underlying circumstances" making the informant "reliable" and his information "credible"? The record discloses that Agents Rassey and Goodowens were aware of such underlying circumstances. The confidential informant's record of past reliability was known to Agent Rassey and is unchallenged by appellants' counsel. *See* note 2, *supra* at 542-43. Additionally, Agent Rassey was aware that the informant had known both "Jimmy" and Ricky Lyons for a number of years, that the informant had spoken to "Jimmy" in the Detroit area during or just before Christmas 1977, that the informant on January 14, 1978, had spoken with "Jimmy" by telephone and had been given a telephone number in the Atlanta, Georgia, area where "Jimmy" and Ricky Lyons would be within the next twenty-four hours, and that during a subsequent telephone conversation with "Jimmy" the confidential informant had heard Ricky Lyons' voice in the background. Agent Rassey passed much of this information along to Agent Goodowens. The knowledge of both the confidential informant's past reliability and the precise methods by which he gathered his information in this case provided sufficient underlying circumstances from which the agent

properly could conclude that the informant was reliable and the information he supplied was credible.

In all other respects, the petition for panel rehearing is DENIED.

A member of the court in active service having requested a poll on the reconsideration of these causes en banc, and a majority of the judges in active service not having voted in favor of it, the petition for rehearing en banc is DENIED.

KRAVITCH, Circuit Judge, dissenting:

I disagree with the majority that the tenuous information appended to the panel opinion satisfies the teachings of *Aguilar* and *Spinelli*. The more important problem, however, is the extension of the rule announced in *United States* v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5416

D.C. Docket No. 78-20A-CR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

GARY KEITH STEAGALD, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Georgia

Before THORNBERRY, CLARK and KRAVITCH, Circuit Judges.

JUDGMENT—April 22, 1980

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

November 13, 1979

Kravitch, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate: April 22, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-6777

GARY KEITH STEAGALD, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

October 6, 1980

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